EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4103080/2018

Held in Edinburgh on 5 and 6 September and 1 November 2018

Employment Judge: Robert King

Miss Maria Gatillo	**Claimant** **In Person**
GX Consultancy Ltd	**Respondent** **Represented by:-** **Mr A McLaughlin, Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant was wrongfully dismissed from her contract of apprenticeship and that she is entitled to an award of £25,000 for breach of her contract.

The Issues

1. The claimant originally presented her claim as one of unfair dismissal. However, at a Preliminary Hearing on 28 June 2018 the Tribunal determined that her contract with the respondent was a contract of apprenticeship and that her claim should proceed as a claim for breach of contract arising from its termination on 8 December 2017.

2. The claimant gave evidence on her own behalf and the respondent led evidence from its directors Gregor Kent and Xander Erkamp. Each party lodged a set of productions and closing submissions were made by each side.

Findings in Fact

The Tribunal made the following findings in fact –

3. As a condition of admission to the University of Dundee's Graduate Level Apprentice programme in order to undertake its BSc in Software Development with Industrial Experience degree course the claimant required to secure a contract of apprenticeship with an employer in that field. The claimant was successful in securing a contract of apprenticeship with the respondent, which was willing to participate in the university's Graduate Level Apprentice programme.

4. The respondent carries on the business of software development and consultancy and has its main office at Unit 7A, Mitchelston Drive Business Centre, Mitchelston Drive, Kirkcaldy, KY1 3NB. It has two directors, Gregor Kent and Xander Erkamp.

5. The claimant began her apprenticeship with the respondent on 3 October 2017, notwithstanding the fact that her written contract stated that her apprenticeship began on 18 September 2017. Her contract of apprenticeship was for a period of four years, which was the length of her degree course and her job title was GLA (Graduate Level Apprentice) Software Development Associate. Her place of work was the respondent's premises at Mitchelston Drive Business centre, Kirkcaldy. In terms of wages, her gross salary was £12,000 per annum and her net monthly pay was £937 per calendar month.

6. The claimant had a written contract of apprenticeship with the respondent, which, *inter alia, provided* as follows: -

> *"**10.** There will be a 6-month probationary period, which may be extended as required by the Company if seen as a requirement.*
>
> …
>
> ***12.** This post is subject to the completion of a 6-month probationary period. At the end of this period if your performance is of a satisfactory standard your appointment will be made permanent. During this period, one weeks' notice may be given by either party to terminate this contract".*

7. As a participant in the Graduate Level Apprenticeship programme, the respondent's relationship with the University of Dundee was governed by the University of Dundee School of Science and Engineering Terms of Engagement.

Under the heading of *"What is expected of an employer employing a GLA"* the Terms of Engagement provided *inter alia* that a participating employer would: -

> *"Employ the apprentice for the length of the Programme and comply with your legal obligations in respect of each of them".*

In this case the length of the Programme in which the claimant and the respondent were participating was 4 years.

8. The practical arrangement between the parties was that the claimant would attend university lectures each Monday and spend the remainder of the week working and training with the respondent at its premises at Mitchelston Drive Business Centre, Kirkcaldy.

9. Prior to beginning her apprenticeship and her degree course the claimant had no software development experience whatsoever. The respondent was aware of that fact when it took her on as its apprentice.

10. The claimant began her apprenticeship with the respondent on Tuesday 3 October 2017. During the first few weeks of her apprenticeship the majority of her time at work was spent most familiarising herself with the business. The claimant moved home from Glasgow to Kirkcaldy on 26 October 2017 and took 24, 25 and 26 October as annual leave for that purpose.

11. On one occasion during the first few weeks of her contract the claimant failed to answer a telephone call at a time when she was the only person in the office. The reason she did not answer the call was that she was new in her role and the respondent had not yet instructed her in the manner that she believed it would have wished her to answer the call. The respondent was annoyed with her because the success of its business relies on excellent customer service and a failure to answer

customer telephone calls can potentially damage its business. This was the only occasion on which she failed to answer the office telephone.

12. The claimant's university lectures on 'coding' (the language of computer programming) began on 30 October 2017, which was in week six of her degree course. The type of coding covered in those initial lectures was Java coding. Having had her first lecture on Java coding the claimant approached the directors on 3 November 2017. She showed them her notes from university and asked if they would go over them with her to assist her understanding of the subject. They were unable to assist at that time but instead said they would ''get back'' to her. They did not.

13. During the week commencing 6 November 2017 the directors showed the claimant a line of coding on a whiteboard within the office and asked her to explain it to them. The directors considered that this line of coding (a 'loop') was very basic computer programming that she should have been able to explain confidently by week two or three of her university course. The claimant asked if she could refer to her notes to assist with her answer, but they said that she could not. As a result, the claimant was unable to correctly explain the coding on the whiteboard. The timing of this incident coincided with the second week of the claimant's university lectures on coding and only the first week of lectures on 'loops'.

14. On 6 November 2017, the directors called the claimant to a meeting, during which they expressed concern about what they believed was a lack of progress in her understanding of Java coding. This was the first occasion on which they expressed any concerns to her about her progress in learning about coding. Following this meeting the claimant was permitted to concentrate on her university course work while in the office in order to allow her to catch up. The directors also agreed that she could focus on Java coding even though the respondent did not use Java in its business, but instead used a programme called SQL.

15. The respondent discussed its concerns about the claimant's lack of progress with Ian Fullerton from the university. As a result, on 17 November 2017 one of the

claimant's lecturers, Mr Chi Onyekaba, attended the respondent's Kirkcaldy offices to spend the day with her in order to provide her with support. Mr Onyekaba visit was voluntary and not at the respondent's request. During his visit, Mr Onyekaba and the claimant discussed the lectures that she had been having in relation to coding and also the line of coding on the whiteboard that she had been unable to explain to the respondent the previous week. Mr Onyekaba's one to one support helped the claimant to understand this line of coding. Hitherto she had understood the logic of the question but had found the coding to be the more difficult element because that was very new and unfamiliar to her at the time.

16. Before Mr Onyekaba left for the day he told the claimant that she needed to memorise everything he had told her because the directors may ask her the same questions. He warned her that if she could not answer the questions then they might not employ her any longer. That shocked the claimant because the respondent had never given her any indication or warning to that effect. The view expressed by Mr Onyekaba was his own opinion and he had not discussed it with the respondent before he spoke to the claimant.

17. On 24 November 2017 the claimant attended a further meeting that was called by the directors in order to discuss her progress. They asked her again to explain the line of coding on the whiteboard and she did so. However, she was not 100% correct in her explanation. The directors then said to the claimant that they were not confident she could do the job she was employed to do because she was still trying to catch up with Java. Mr Kent told the claimant that he had seen no progress but the claimant did not understand what he meant by that. The claimant explained to them that some other students were also having difficulty with Java because the lectures on coding were too fast and, in common with her, those other students were also learning about coding for the first time. During this meeting the directors' focus was on criticising the claimant's failure to understand Java rather than encouraging her and assisting her with it.

18. However, during the following week the claimant reached the stage where, having focussed on it, she believed that she had caught up in her understanding of Java.

Having done so she therefore began to work with SQL as well as Java. She advised the directors of this and explained that she was doing so because she now felt more comfortable in her knowledge of Java.

19. On 8 December 2017 the respondent's directors called the claimant to a further meeting. No written invitation was sent, and no indication was given to her as to the reason for the meeting. During the meeting the directors asked her how things were going and if she was now able to write a programme. The claimant replied that she could not do so yet. The directors told her that they believed she should have been able to write a programme by then because it had already been taught in university. The directors then asked her questions about both Java and SQL programming, some of which she was able to answer correctly but not all. She had been given no notice of the questions in advance and no preparation time.

20. Mr Kent told the claimant that everyone was talking about her and referring to her as "the girl sitting in the corner not doing anything". Mr Kent also criticised the claimant for not trying to fix the audio on her laptop when it had not been working. In response the claimant explained that the reason she did not try to fix it was because it was an expensive piece of equipment costing £2,000 and she did not wish to risk damaging it further.

21. At the end of the meeting the directors told the claimant that they were terminating her contract and issued her with a dismissal letter dated 8 December 2017, which they had prepared in advance and taken into the meeting. They told her that they had no confidence in her and were terminating her contract because they could not continue to employ someone who was not contributing to the company. Although the claimant was advised she was contractually entitled to one week's notice she agreed to leave immediately and to be paid in lieu of notice.

22. The respondent believed that it was lawfully entitled to terminate the claimant's contract of apprenticeship in these circumstances because of the terms of clauses 10 and 12 of the contract, which dealt with the claimant's probationary period. The

respondent's letter dismissing the claimant dated 8 December 2017 stated as follows: -

> *"Dear Maria*
>
> *Termination of Contract (Probationary Term)*
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> *It is with deep regret that I must inform you of the Termination of your GLA position at GX Consultancy with the agreement of no notice period required from either party. Due to your struggles with learning the required skills and being able to meet the responsibilities for your currently assigned role, such as the time needed to cover university work has taken away your ability to be able to undertake your work duties, such as the ability to develop/support any applications or databases, be able to support clients and understand the problem areas, ascertain the correct and relevant information, and to be able to provide solutions to support calls for clients, the company is unable to further justify your position".*

23. Although in the meetings prior to her dismissal the directors had spoken to the claimant about their concerns in relation to what they perceived as her lack of progress they did not produce evidence that clearly identified for the claimant the weaknesses that they perceived in her performance and they did not provide her with specific support to address those weaknesses. All they did was inform her that her progress was not what they expected. The directors did not at any time define what they meant by this in order that the claimant would be able to understand and address such weaknesses as they perceived in her performance. In his evidence Mr Erkamp admitted that the respondent did not have the knowledge or time to properly document its concerns about the claimant's progress.
24. Furthermore, prior to her dismissal, the directors did not provide the claimant with any form of structured training plan in which areas of weakness were identified, targets for improvement were set and appropriate timescales were agreed in order to achieve those targets with appropriate support.

25. At no time did the directors speak directly with anyone from the university in order to clarify what the claimant was learning there during her apprenticeship. They did however have access to an online portal where they were able to view details of the course syllabus. However, according to Mr Erkamp, he only followed the claimant's syllabus 'quite loosely'.

26. The respondent did not give the claimant any warning prior to the 8 December 2017 meeting to the effect that her future as its apprentice was in jeopardy. Having terminated her employment, the respondent then failed to provide the claimant with an opportunity to appeal against its decision.

27. During the period of the claimant's apprenticeship with the respondent she carried out 3 graded assignments at university as follows: -

    Assessment 1 - Information Systems Report on 2 November 2017 for which she scored 63%;

    Assessment 2 - Information Systems Infrastructure on 16 November 2017 for which she scored 69%;

    Assignment 1 on Java programming on 4 December 2017 for which she scored 76%.

28. The respondent did not check any of the claimant's university scores before it terminated her employment.

29. Since the claimant's dismissal she has been unable to find another employer to allow her to continue her participation on the Graduate Level Apprenticeship scheme. While she successfully passed the first year of her degree course she has therefore been unable to enter the second year because she does not have a sponsoring employer.

30. Since her dismissal the claimant has not worked at all. She has however taken reasonable steps to find suitable alternative work, which has included trying to find

jobs outside the software field, albeit her focus has been on finding a similar job in order that she might complete her degree and her apprenticeship.

31. The claimant's only income since her dismissal has been Universal Credit of which she has received the total sum of £6,258 up to the hearing date. Her current income is £671 of that benefit each month.

Relevant Law – Wrongful Dismissal/Breach of Contract

32. The Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 SI 1994/1624 provides that an employee may bring a claim for a sum due if

> *"the claim arises or is outstanding on the termination of the employment of the employee",* (section 3 (c)) and that
>
> *"An Employment Tribunal shall not in proceedings in respect of a contract claim … order the payment of an amount exceeding £25,000." (section 10)*

33. The ACAS Code of Practice on Disciplinary and Grievance Procedures provides that –

> *"Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions.*
> *Employers and employees should act consistently.*
> *Employers should carry out necessary investigations, to establish the facts of the case.*
> *Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.*
> *Employers should allow employees to be accompanied at any formal discipline or grievance meeting.*
> *Employers should allow an employee to appeal against any formal decision made"*

Submissions

34. For the respondent it was submitted that both directors of the company, each of whom had first-hand knowledge of the claimant's work and had the opportunity to monitor her progress and her training, had taken the decision unanimously.

35. The claimant's contract of apprenticeship had been ended in accordance with a clear and unambiguous term of the contract and she had not been wrongfully dismissed. There was no ambiguity in the relevant part of her contract dealing with the probationary period and the respondent had acted in accordance with those terms in terminating her employment.

36. On behalf of the respondent Mr McLaughlin accepted that, in the absence of a clear contractual term such as that he was relying on, matters may have been different having regard to the protection normally afforded to apprentices by the law.

37. However, he referred to the case of *Wallace v CA Roofing Services Limited 1996 IRLR 43*, which he submitted supported his argument that a contract of apprenticeship was terminable for reasons other than gross misconduct in circumstances where the contract provided a clear mechanism for that.

38. The respondent also submitted that the claimant had received a warning about dismissal by virtue of the university lecturer having told the clamant that she may be dismissed if her performance did not improve.

39. It was also submitted on behalf of the respondent that the claimant had failed to mitigate her loss because she had limited herself to the field of software development. The claimant had also failed to make genuine and credible efforts to find suitable alternative work in circumstances where she had not carried out sufficient investigation of potential employers but rather had applied an approach of simply sending her CV to random potential employers.

40. The claimant submitted that the respondent had wrongfully dismissed her and that in so doing it had also failed to follow the ACAS Code of Practice on Disciplinary and

Grievance Procedures. The meetings that had taken place on the 6 November, 24 November and 8 December were never characterised as "disciplinary" meetings and she had no idea that her dismissal was in contemplation before her contract was terminated. Nor had she been offered a right of appeal against her dismissal.

41. She submitted that prior to her dismissal there had been a failure to carry out a proper investigation into the performance issues that had resulted in her dismissal. There had been no minutes of meetings ever taken, no documentary or other evidence provided of her alleged performance failings, no training plan prepared, no targets set with timescales to achieve them and no adequate support.

42. She also submitted that the respondent had failed to comply with the terms of its engagement with the university, which had committed the respondent to employing her for the full four-year duration of her degree course.

Discussion and Decision

43. It is long established that a contract of apprenticeship differs from a normal contract of employment. One of the essential features of it is the limited right of dismissal in the hands of the employer, save for circumstances in which his or her conduct is so bad that it becomes impossible to teach them the trade (*Newell v Gillingham Corporation 1941 1 All ER 552); Learoyd v Brook 1891 1 QB 431*.

44. It was not in dispute that during her apprenticeship the respondent raised its concerns with the claimant about her lack of progress in understanding computer coding and that it did so in meetings with her on 6 November and 24 November in advance of the termination of her employment on 8 December 2017. However, the claimant did not understand what the respondent meant by a lack of progress because the respondent did not explain that to her.

45. The Tribunal therefore finds that the respondent failed to provide the claimant with adequate specification of its concerns about her perceived lack of progress. It also failed to provide her with reasonable achievable targets that she would be able to work towards with proper support.

46. The Tribunal also finds that the respondent failed to consider that prior to undertaking her apprenticeship she had no experience in software whatsoever and that she did not have any lectures on coding until 30 October 2018. In the circumstances its criticism of her for being unable to explain the 'loop' line of coding on the whiteboard by 6 November 2018 was wholly unjustified.

47. Despite having meetings with her on 6 and 24 November 2017 where the claimant's alleged lack of progress was discussed, the respondent also failed to give her any warning that the termination of her apprenticeship was in its contemplation at any time prior to her dismissal. The Tribunal rejects the respondent's assertion that when her lecturer spoke to her on 17 November 2017, this should have put her on notice that her employer was considering terminating her apprenticeship.

48. The Tribunal also finds that in all the circumstances and because the respondent prepared the dismissal letter in advance of the meeting on 8 December 2017, the decision to dismiss was pre-determined no matter what the claimant would have said at that meeting.

49. The respondent sought to argue that the claimant's dismissal had been carried out in accordance with clauses 10 and 12 of her contract of apprenticeship. However, each of the contractual clauses in relation to the probationary period clearly defines it as a six-month probationary period and does not set out the circumstances in which that probationary period can be cut short. The Tribunal therefore rejects the respondent's assertion that the claimant's dismissal was permitted by the terms of the contract.

50. In any event, in a wrongful dismissal claim such as this, the Tribunal's concern is not with what the employer believed occurred but is with what actually occurred. To find in favour of the respondent the Tribunal would therefore have to be satisfied that the claimant was in fact behaving or performing at such a level that she had become impossible to train and the respondent had therefore been entitled to terminate her contract of apprenticeship.

51. However, the respondent has failed to produce evidence that would support such a conclusion. While the Tribunal accepts that the claimant was, by her own admission, struggling at first to understand coding, no evidence was led that by the time of her dismissal she was so far behind that she would have been unable to catch up and complete her apprenticeship.

52. The Tribunal noted that one of the respondent's productions referred to a document that purported to contain examples of the claimant's performance failings. However, no evidence of those examples was ever led. Furthermore, the incident in which the claimant failed to answer the telephone was a perfectly understandable one-off situation that carries no weight in the Tribunal's deliberations.

53. Indeed, the only relevant evidence before the Tribunal was that of the claimant's scores on the assessments she undertook at university while still undergoing her apprenticeship, all of which indicated she was making good progress in her studies.

54. The respondent has therefore failed to prove that the claimant's performance or her progress in her studies was so poor that it had become impossible to teach her the trade of software development. In all the circumstances it was not entitled to terminate her contract.

55. As a result, the Tribunal finds that the respondent wrongfully dismissed the claimant in breach of her contract of apprenticeship and she is entitled to the damages that flow from that breach.

56. In the case of *Dunk v George Waller and Son Limited 1970 2 All ER 630* the Court of Appeal stated that *"the very object of an apprenticeship agreement is to enable the apprentice to fit himself to get better employment. If his apprenticeship is wrongly determined, so that he does not get the benefit of the training for which he stipulated, then it is a head of claim for which he may recover".*

57. In that case the Court found that the damage that an apprentice had suffered when wrongfully dismissed could be divided into 2 parts; firstly, his loss during the remaining period of his apprenticeship (the short-term loss) and secondly his loss during the period after the apprenticeship had expired (the long-term loss).

58. The claimant remains unemployed and in receipt of Universal Credit since her dismissal. She seeks damages based on payment of the wages she would have earned had she not been dismissed and for her loss of prospects in the job market in circumstances where the likelihood now is that she will neither achieve her apprenticeship or her desired degree. She has acted reasonably in attempting to mitigate her loss.

59. The Tribunal considers that the claimant will suffer disadvantage in the job market because she has not completed her apprenticeship or her degree, which she is now unable to do without a sponsoring employer. Therefore, even if she obtains employment within a software business it will not be at the higher rate of pay that a degree qualified software consultant would command.

60. So far as her short term losses are concerned, the claimant has already lost £3,688.58 in wages between the date of her dismissal and the date of the hearing. The Tribunal must also consider the claimant's continuing loss from the date of the hearing, which on the basis of her current income is £3,192 per annum and will therefore amount to a figure in the region of £10,000 for the duration of the remainder of her four-year contract of apprenticeship.

61. Considering that in the long term she will be unable to command the higher salary levels that a graduate apprentice would be able to earn she will also continue to suffer financial loss as a result. In all the circumstances her total financial losses including future financial losses will be in excess of the £25,000 award that is the maximum award a Tribunal can make. Accordingly, the Tribunal finds that she is entitled to an award in that amount.

62. The ACAS Code of Practice on Disciplinary and Grievance Procedures applied to the termination of the claimant's employment. The Tribunal finds that the respondent unreasonably failed to comply with the Code in circumstances where: -

- It failed to carry out a proper investigation in relation to the alleged performance issues;
- The claimant was not adequately notified about the alleged performance issues or the possible consequences;
- The claimant was not allowed to be accompanied at the dismissal meeting on 8 December 2017;
- The decision to dismiss was predetermined before the dismissal meeting;
- The claimant was not provided with an opportunity to appeal her dismissal.

63. While in all the circumstances it would have been just and equitable to increase the amount of the award in terms of Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (as inserted by Section 3 of the Employment Act 2008) the Tribunal is not empowered to increase the award above the £25,000 maximum provided for by section 10 of The Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994. For that reason alone, no uplift on the award is made.

Employment Judge: King
Judgment Date: 01 December 2018
Entered into the Register: 14 December 2018
And Copied to Parties